UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

TODD BATTEN, an individual; ROBERT DYER, an individual; REGGIE MORRIS, an individual; and ANNA TESTER, an individual,

Plaintiffs,

v.

PROVIDENCE ST. JOSEPH HEALTH; PROVIDENCE HEALTH & SERVICES; PROVIDENCE HEALTH AND SERVICES – WASHINGTON d/b/a PROVIDENCE; PROVIDENCE ST. MARY MEDICAL CENTER; and PROVIDENCE MEDICAL GROUP d/b/a PROVIDENCE MEDICAL GROUP SOUTHEAST WASHINGTON NEUROSURGERY, a/k/a PMG NEUROSCIENCE INSTITUTE, WALLA WALLA a/k/a NEUROSCIENCE INSTITUTE d/b/a PROVIDENCE,

Defendants.

CASE NO: 2:23-CV-0097-TOR

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are Defendants' Motion for Summary Judgment (ECF No. 50) and Plaintiffs' Motion to Enforce Court Order and Compel Production (ECF No. 87) and Motion to Expedite (ECF No. 89). These matters were submitted for consideration without oral argument. The Court has reviewed the record and files herein and is fully informed. For the reasons discussed below, Defendants' Motion for Summary Judgment (ECF No. 50) is **GRANTED**, and Motion to Enforce Court Order and Compel Production (ECF No. 87) and Motion to Expedite (ECF No. 89) are **DENIED as moot**.

## BACKGROUND

This case arises out of allegedly negligent back surgeries performed by former neurosurgeons, Jason A. Dreyer, D.O. ("Dr. Dreyer"), and Daniel P. Elskens, M.D. ("Dr. Elskens"), while working as agents and employees of Defendants in Washington State. ECF No. 1 at ¶ 1.1. Between 2015 and 2018, each named Plaintiff underwent back surgery performed by either Dr. Dreyer or Dr. Elskens that Plaintiffs allege were not medically necessary and resulted in permanent injury. *Id.* at ¶¶ 4.2.2.,4.3.4,4.4.4,4.5.4. Dr. Dreyer and Dr. Elskens have since resigned from their positions. *Id.* at ¶¶ 1.9,1.11.

Between April 12, 2022, and May 21, 2022, Plaintiffs Todd Batten, Robert Dyer, and Anna Tester learned of a settlement between the United States Department of Justice ("DOJ") and Providence within the Eastern District of

Washington involving claims that Dr. Dreyer and Dr. Elskens had been permitted by Providence to perform unnecessary surgeries on patients. *Id.* at ¶¶ 4.2.6,4.3.5,4.5.5. In or about April of 2021, Plaintiff Reggie Morris learned through a news report of a different case concerning Providence and Dr. Dreyer's alleged fraud in performing unnecessary surgeries. *Id.* at ¶ 4.4.7. All Plaintiffs assert they were not aware their respective surgeries may have been unnecessary or negligently performed until learning of these other allegations against Providence, Dr. Dreyer and Dr. Elskens.

On April 10, 2023, Plaintiffs filed their Complaint against Defendants asserting Washington State law claims of corporate negligence and vicarious liability for the medical negligence of Dr. Dreyer and Dr. Elskens. ECF No. 1. Plaintiffs also assert Defendants are jointly and severally liable for the damages caused by the negligent care of Plaintiffs under an "acting in concert" theory. *Id.* at ¶ 7.2.

## DISCUSSION

Defendants move for summary judgment on all claims arguing they are time barred under Washington's statute of limitations, RCW § 4.16.350. ECF No. 50.

### I. Motion for Summary Judgment

Summary judgment may be granted to a moving party who demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled

to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier-of-fact] could reasonably find for the plaintiff." *Id*. at 252.

For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Id*. at 248. A dispute concerning any such fact is "genuine" only where the evidence is such that the trier-of-fact could find in favor of the non-moving party. *Id*. "[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial." *Id*. (internal quotation marks omitted); *see also First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968) (holding that a party is only entitled to proceed to trial if it presents sufficient, probative evidence supporting the claimed factual dispute, rather than resting on mere allegations). In ruling upon a summary judgment motion, a court must construe the facts, as well as all rational inferences therefrom, in the light most favorable to the non-moving

party, *Scott v. Harris*, 550 U.S. 372, 378 (2007), and only evidence which would be admissible at trial may be considered, *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

## II. Analysis

Defendants contend all of Plaintiffs' claims are time barred under Washington's statute of limitations for medical negligence claims. ECF No. 50 at 4. Pursuant to RCW § 4.16.350(3), medical negligence claims

> shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission.

Plaintiffs do not dispute that their medical negligence claims were not filed within three years of their respective surgeries. ECF No. 65 at 3. Rather, Plaintiffs assert the latter limitation period of one year, otherwise known as the discovery rule, applies in this case.

"The discovery rule operates to toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim." *Giraud v. Quincy Farm & Chem.*, 102 Wash. App. 443, 449 (2000). "The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are

enough to establish a legal cause of action." Allen v. State, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). Where a plaintiff invokes the discovery rule to counter a statute of limitations defense, the burden lays with the plaintiff to demonstrate the relevant facts were not discovered or could not have been discovered earlier with due diligence. *G.W. Const. Corp. v. Pro. Serv. Indus., Inc.*, 70 Wash. App. 360, 367 (1993). "Unless the facts are susceptible of only one reasonable interpretation, it is up to the jury to determine whether the plaintiff has met his burden." *Giraud*, 102 Wash. App. at 451.

Defendants argue the discovery rule does not apply in this case because Plaintiffs had knowledge of their injuries and concerns within the three-year statute of limitations. ECF No. 50 at 7. Plaintiffs counter that the worsening pain and complications arising after the surgeries did not provide notice that the procedures were possibly unnecessary because the surgeons had warned of such risks and side effects prior to operating. ECF No. 65 at 7-8. Plaintiffs argue complications from surgery can still arise in the absence of negligence, thus the negligence in this case was exposing Plaintiffs to the unnecessary risks of complications by performing unnecessary surgeries. *Id.* at 8. Therefore, Plaintiffs assert the discovery rule is applicable because they were not made aware that their surgical procedures were possibly unnecessary until learning of the settlement between Providence and the DOJ, or in the case of Plaintiff Reggie Morris, hearing on the news of another case

alleging Defendants' fraud related to unnecessary surgeries. ECF No. 65 at 7-8.

Defendants reply that the complications and issues Plaintiffs complained of after their surgeries triggered their duty to inquire, and such inquiry would have led Plaintiffs to discover the facts underlying their claims that the surgeries were unnecessary or negligently performed. ECF No. 80 at 4. Defendants argue that Plaintiffs' knowledge of the broader allegations underlying the DOJ's investigation was not needed to learn the essential facts of their claims. *Id.* After reviewing the relevant law and alleged facts of this case, the Court agrees with Defendants.

Each Plaintiff complained of complications and worsening pain after their respective surgeries. And even though Plaintiffs were told such complications were possible risks of surgery, Washington law still requires a plaintiff to exercise due diligence where the injury and cause of that injury are known. Plaintiffs' argument that they did not learn of a possible breach of duty until years later did not excuse this due diligence requirement. *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 113 (1991) ("The 1-year post-discovery period can be invoked only when the plaintiff has exercised due diligence; it will not be invoked when the plaintiff has had ready access to information that a wrong has occurred."); *Reichelt v. Johns-Manville Corp.*, 107 Wash. 2d 761, 772 (1987); *Gevaart v. Metco Construction, Inc.*, 111 Wn.2d 499, 760 (1988).

*Reichelt* and *Gevaart* are particularly instructive here. In *Reichelt*, the

plaintiff brought a claim of negligence based on his exposure to asbestos while working as an asbestos worker, and the issue became whether his claim was time barred under the statute of limitations. *Reichelt*, 107 Wash. 2d at 763. The Washington Supreme Court rejected the plaintiff's argument that his claim was timely because he did not become aware of the defendant's breach of duty until less than a year prior to bringing suit.

> Mr. Reichelt would have us adopt a rule that would in effect toll the statute of limitations until a party walks into a lawyer's office and is specifically advised that he or she has a legal cause of action; that is not the law. A party must exercise reasonable diligence in pursuing a legal claim. If such diligence is not exercised in a timely manner, the cause of action will be barred by the statute of limitations.

*Id.* at 772.

In *Gevaart*, the plaintiff was injured after stepping on a sloped step causing her to tumble backwards. *Gevaart*, 111 Wn.2d at 500. The plaintiff reasoned that even though she knew the step was sloped and caused her injury, she was not aware that the slope existed because the builder breached a duty toward her but rather assumed the slope was for drainage. *Id.* at 501-02. She therefore argued that the limitation statute had not begun to run until she learned of the breach much later. *Id.*

The Washington Supreme Court again rejected this argument as contrary to Washington law. "[T]he discovery rule does not require knowledge of the

existence of a legal cause of action. To so require would effectively do away with the limitation of actions until an injured person saw his/her attorney." *Id.* at 502 (internal citations omitted). Rather, the court found the statute of limitations clock began to run on the day she was injured because she knew the step was sloped and "[b]y the exercise of due diligence she could have determined that the step did not conform to the building code and further, the true reason why the slope existed." *Id.*

Washington courts require the same due diligence by plaintiffs in the medical malpractice context. *See Zaleck*, 60 Wash. App. at 114; *Lo v. Honda Motor Co.*, 73 Wn. App. 448, 464 (1994); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wash. App. 176, 191 (2009). The discovery rule is not invoked "when the plaintiff had ready access to information that a wrong occurred." *Gevaart*, 111 Wn.2d at 502. Thus, when a plaintiff is aware of an injury and the cause of that injury, the duty to inquire arises. Only by a plaintiff demonstrating that the essential facts underlying the cause of action could not have been discovered with due diligence within those three years after the act or omission has occurred, will the discovery rule apply. *Zaleck*, 60 Wash. App. at 113. *See also Winbun v. Moore*, 143 Wn.2d 206 (2001) (upholding jury verdict finding plaintiff could not have discovered relevant facts with due diligence where omission of medical records obscured the nature and extent of plaintiff's care); *Lo v. Honda Motor Co.*,

73 Wash. App. 448 (1994) (finding due diligence a question of fact for the jury where a defective product presented as another facially logical explanation for plaintiff's injuries rather than medical malpractice).

A review of each of the individual claims in this case demonstrates a lack of due diligence where such a duty existed.

**a. Plaintiff Todd Batten**

Dr. Dreyer performed cervical surgery on Mr. Batten on July 15, 2015. ECF No. 68 at 2. Mr. Batten states that prior to the surgery, Dr. Dreyer told him surgery was necessary and had to performed straight away. ECF No. 68 at 2. As a result of the surgery, Mr. Batten suffered from adjacent segment disease in his cervical spine and had increased pain and loss of range of motion. ECF No. 1 at ¶ 4.2.2. Dr. Dreyer then allegedly told Mr. Batten that a second surgery was urgently needed because the first had failed to fix all the cervical area. ECF No. 68 at 2. Dr. Dreyer performed the second cervical surgery on Mr. Batten on April 18, 2018. ECF No. 66 at 2.

On June 27, 2018, Mr. Batten requested an earlier follow up appointment with Dr. Dreyer's office due to progressing pain in his neck and shoulders after the second surgery. ECF No. 52 at 2. He also reported that he was needing to take an opioid pain medication for relief even though he had not previously needed it immediately after the surgery. *Id.* At an appointment the next day, Mr. Batten

reported he was experiencing more cervical pain than he had preoperatively, and the pain had progressed since he had previously been seen at his one-month post-operation checkup. ECF No. 52 at 1. He states he was not seen by Dr. Dreyer at that appointment and was told he was out of the office. ECF No. 68 at 2.

For the rest of 2018, Mr. Batten was not seen by Dr. Dreyer at any of his follow-up appointments. *Id.* at 2-3. In early 2019, Mr. Batten learned from a letter posted in his online medical chart that Dr. Dreyer had resigned from Providence. *Id.* at 3. On April 23, 2019, Mr. Batten's spouse called Providence to report Mr. Batten continued to have pain and asked if Dr. Dreyer was let go for doing unnecessary surgeries. ECF No. 81 at 8. She was informed by a medical assistant that it was Dr. Dreyer's choice to resign. *Id.*

Plaintiffs argue the facts presented do not show that Mr. Batten should have been aware that the cause of his symptoms were from unnecessary surgeries. ECF No. 65 at 9. However, the surgeries themselves were the cause of Mr. Batten's symptoms. Whether he knew they were unnecessary, and thus negligently performed, was not required to invoke the discovery rule. "The key consideration under the discovery rule is the factual, as opposed to the legal, basis of the cause of action." *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wash.2d 15, 35, 864 P.2d 921 (1993). Mr. Batten's worsening pain after the second surgery, particularly in light of Dr. Dreyer allegedly informing Mr. Batten the second

surgery was needed to address issues missed in the first surgery, would have alerted a reasonable person to the possibility that the surgery was negligently performed.

Mr. Batten's spouse's phone call even demonstrates their suspicion that Dr. Dreyer was performing unnecessary surgeries. However, even if Mr. Batten was not aware the surgeries were unnecessary at that time, the facts constituting a negligence claim could have been discovered through due diligence, such as getting a second opinion of his initial MRI scans after he first reported worsening symptoms on June 27, 2018, or at the latest after his spouse's phone call on April 23, 2019. Mr. Batten has not demonstrated he was due diligent or due diligence would not have discovered the essential facts underlying his claim. *Clare v. Saberhagen Holdings, Inc.*, 129 Wash. App. 599, 603 (2005) ("The plaintiff bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period."). Mr. Batten learning of the DOJ settlement with Providence did not provide him knowledge of a fact essential to his claim that he could not have otherwise known through due diligence earlier, it simply alerted him to the existence of a possible legal cause of action.

The Court finds Mr. Batten failed to demonstrate due diligence when he knew the critical facts underlying his cause of action within the applicable time

period. Therefore, the discovery rule does not apply, and Mr. Batten's claims are untimely pursuant to RCW § 4.16.350(3). *See Zaleck v. Everett Clinic*, 60 Wn. App. at 113.

**b. Plaintiff Robert Dyer**

Dr. Dreyer performed lumbar surgery on Mr. Dyer on March 13, 2018. ECF No. 66 at 4. Mr. Dyer states that prior to the surgery, Dr. Dreyer told him that he was at risk of becoming paralyzed and needed extensive surgery as soon as possible. ECF No. 69 at 2.

On June 26, 2018, Mr. Dyer reported that he did not believe the healing process was progressing as it should and that he continued to have muscle ache with weakness in his lower back. ECF No. 52 at 5. He was not seen by Dr. Dreyer but was referred for physical therapy. *Id.*

On January 25, 2019, Mr. Dyer reported persistent pain and symptoms effecting his quality of life. *Id.* at 4. He reported stabbing pain across his right lower back where the surgery was performed. He also stated his legs were still weaker prior to the surgery and he had growing numbness in his feet. *Id.* Finally, he stated he was experiencing urinary issues and had to wear urinary incontinence pads. Mr. Dyer also learned at that time Dr. Dreyer had resigned from his position. *Id.*

On June 13, 2019, Mr. Dyer complained of continued back and lower

extremity symptoms that began after his surgery. ECF No. 52 at 3. He also reported that the pain was greater than it was prior to surgery. He described the pain as "crushing, sharp, shooting, stabbing and throbbing." *Id.* Mr. Dyer also reported that his persistent leg symptoms improved with nothing. *Id.*

Plaintiffs argue these facts do not show Mr. Dyer should have known his symptoms were caused by unnecessary surgery and further argues that Dr. Dreyer warned Mr. Dyer prior to the operation that additional injury could result. ECF No. 65 at 10. However, Mr. Dyer did have knowledge that his continuous and worsening symptoms resulted from the surgery Dr. Dreyer performed on him. He also expressed concern with the progression of his healing soon after surgery. "Generally, if the plaintiff is aware of some injury, the statute of limitation begins to run even if he does not know the full extent of his injuries." *Steele v. Organon, Inc.*, 43 Wn. App. 230, 234 (1986). Furthermore, even if Mr. Dyer did not have reasonable suspicion of the facts underlying his cause of action, he has not demonstrated that, with due diligence, he could not have known about his cause of action until learning about the DOJ settlement with Providence. Like Mr. Batten, Mr. Dyer could have gotten a second opinion on whether his initial MRI scans indicated a need for surgery. Therefore, the discovery rule is inapplicable as a matter of law and Mr. Dyer's claims are similarly untimely.

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**c. Plaintiff Reggie Morris**

Dr. Dreyer performed two surgeries on Mr. Morris: a cervical spine surgery on January 28, 2016, and thoracic spine surgery on January 19, 2017. ECF No. 66 at 5. Mr. Morris states that prior to these surgeries, Dr. Dreyer told him each was necessary and had to be performed in the near future. ECF No. 70 at 2.

After the thoracic surgery, Mr. Morris states he returned to Providence multiple times with complaints of increased pain and other symptoms. *Id.* He claims he was told by many Providence employees that it would take time for him to recover from his surgery. *Id.* On December 12, 2017, Mr. Morris received steroid injections to address muscle spasms in his back that had been ongoing since his thoracic surgery. ECF No. 52 at 10-11. Several months later, he requested repeat injections to again alleviate his back symptoms. *Id.* at 9. Mr. Morris states that he repeatedly requested to meet with Dr. Dreyer for a follow-up appointment but was told Dr. Dreyer was out of the office and no one knew when he would return. ECF No. 70 at 2-3.

In June 2018, Mr. Morris reported that fluid was draining from his incision area. *Id.* at 7. The drainage was treated as an infection however a culture of the fluid indicated it was likely not an infection. ECF No. 52 at 7. Because Dr. Dreyer was still out of the office, Mr. Morris was referred to an infection and neurosurgery specialist at another Providence location. ECF No. 70 at 3. On November 11,

2018, a different neurosurgeon with Providence performed thoracic surgery on Mr. Morris to remove most of the hardware installed by Dr. Dreyer. *Id.* Mr. Morris continued to see healthcare providers for his back issues in 2018, 2019, and 2020. *Id.*

Plaintiffs again assert Mr. Morris did not have the factual basis to discover the surgeries performed by Dr. Dreyer were unnecessary prior to learning of Providence and Dr. Dreyer's alleged fraud on the news in April of 2021. ECF No. 65 at 11. The Court again disagrees for the same reasons previously discussed. Of particular significance in Mr. Morris's case is that he obtained corrective surgery to remove most of the hardware installed by Dr. Dreyer. Thus, even if Mr. Morris being told by Providence employees that he needed to give his back "time to recover" and Mr. Morris's own assertion that he was told by a physician's assistant that his thoracic surgery was not the cause of his symptoms would not have triggered a reasonable person to further investigate for possible negligence, the corrective surgery certainly would have. Thus, Mr. Morris has not demonstrated that the essential elements of his claim could not have been discovered even with due diligence after November 11, 2018. Therefore, the discovery rule is

inapplicable, and Mr. Morris's claims are untimely.[1]

**d. Plaintiff Anna Tester**

In Ms. Tester's declaration, she states that on November 29, 2016, Dr. Elskens told her she needed urgent low back surgery. ECF No. 71 at 2. Dr. Elskens subsequently performed lumbar surgery on Ms. Tester December 30, 2016. ECF No. 53 at 5. After surgery, Ms. Tester states she expressed concern with Dr. Elskens and other Providence employees about low back pain, muscle spasms, new numbness and tingling in her right leg and foot. ECF No. 71 at 2. She states she was told by Dr. Elskens and the other Providence employees that the tingling and numbness was to be expected and would get better over time. *Id.* At the three-month follow up appointment, Ms. Tester again expressed concern with

[1] After Mr. Morris became aware of the claims against Providence and Dr. Dreyer in April of 2021, a Good Faith Request for Mediation under RCW 7.70.110 was served on defendants February 22, 2022, which normally extends the statute of limitations for a claim by one year. ECF No. 66 at 7; RCW 7.70.110. The parties subsequently entered into a tolling agreement on January 22, 2022, extending the statute of limitations for Mr. Morris until May 22, 2023. ECF No. 66 at 7. However, Mr. Morris's claim expired well before February 22, 2022, and Plaintiffs have not provided that tolling agreement in their exhibits.

the numbness and tingling in her right leg and foot but was again reassured by Dr. Elskens that the symptoms would get better over time. *Id.* After this appointment, Dr. Elskens left Providence. *Id.* at 3. Ms. Tester reported to a different Providence facility in 2018 and 2019 for neurosurgery follow-up consultation and pain management related to her lumbar surgery. *Id.* She reported continued numbness in her right calf and foot. *Id.*

Plaintiffs again argue that these facts do not show that Ms. Tester should have known that her symptoms were caused from an unnecessary surgery. ECF No. 65 at 12. Plaintiffs also point to Elsken's pre-operative notes in Ms. Tester's chart stating, "it is realistic to anticipate that some symptoms will continue postoperatively despite a successful surgery" and that some may even worsen. ECF No. 67-20.

As the Court previously explained, Ms. Tester's knowledge that her surgery may have been unnecessary is not required to invoke the discovery rule where prior due diligence could have alerted Ms. Tester to the essential elements of her claim. Ms. Tester repeatedly reported the numbness and tingling in her leg as new symptoms post-operation and was told by Dr. Elskens on two separate occasions that the symptoms would improve over time. ECF No. 71 at 2. The lack of improvement over the following three years should have put Ms. Tester on notice of possible negligence. Ms. Tester's subjective belief that she had no reason to

suspect her surgery was unnecessary or negligently performed until 2022 did not excuse her duty to exercise due diligence where a reasonable person would have doubted the doctor's assurances long prior. *Id.* at 3-5. Because Ms. Tester was not diligent, the discovery rule is inapplicable as a matter of law and her claim is also untimely.

## CONCLUSION

For the foregoing reasons, the Court finds Plaintiffs have failed to raise an issue of material fact that the discovery rule applies to their claims of medical negligence thereby tolling the statute of limitations. Plaintiffs' claims are time-barred and therefore must be dismissed. Additionally, as Plaintiffs' corporate negligence claims are based on the injuries Plaintiffs suffered from negligent health care, the statute of limitations set forth in RCW 4.16.350 also applied to those claims.

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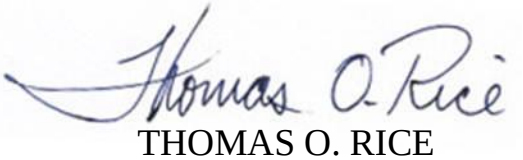
**ACCORDINGLY, IT IS HEREBY ORDERED:**

1. Defendants' Motion for Summary Judgment (ECF No. 50) is **GRANTED**.
2. Plaintiffs' Motion to Enforce Court Order and Compel Production (ECF No. 87) and Motion to Expedite (ECF No. 89) are **DENIED as moot**.
3. The deadlines, hearings and trial date are **VACATED**.

The District Court Executive is directed to enter this Order, enter Judgment, furnish copies to counsel and **CLOSE** the file.

DATED June 30, 2025.

THOMAS O. RICE
United States District Judge